Supreme Court, U.S.
FILED
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No. 04-1618

IN THE

Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 1, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Docket #: 04-13308-DD

Short Style: Zurich Insurance Co. v. Chatham County, GA

Docket Date: 07/06/2004

Nature of Suit: Contract Marine

* * *

07/07/2004	Briefing Notice Issued
07/07/2004	DKT7CIV (Docketing Notice confirming brief due date) issued. To: Clark, Fred S.; c:Garrard, Emily E.; c:Hart, R. Jonathan; c:Scott L. Poff

* * *

07/08/2004	Probable Jurisdiction Noted
07/16/2004	Civil Appeal Statement Form:

* * *

09/16/2004	Appellant Brief Filed: (Atty: Fred S. Clark)

* * *

09/27/2004	Appellee Brief Filed PT'D (edf): (Atty: R. Jonathan Hart)

* * *

01/28/2005	Judgment Entered
01/28/2005	OPIN1A (Notice of issuance of opinion) issued, costs taxed against appellant. c:Clark, Fred S.; c:Garrard, Emily E.; c:Hart, R. Jonathan; c:Moore, William T. Jr.
01/28/2005	Opinion Issued

02/11/2005	Petition for Rehearing: (Atty: Fred S. Clark)
	* * *
03/04/2005	The petition for rehearing filed by aplt Zurich Insurance is DENIED.
	* * *

RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

CIVIL DOCKET FOR CASE #: 4:03-cv-00099-WTM

* * *

Date Filed	#	Docket Text
06/02/2003	1	COMPLAINT for damages Filing Fee $150.00 Receipt #401569 (wwl) (Entered: 06/04/2003)
	* * *	
06/20/2003	3	ANSWER to Complaint by Chatham County, GA (Attorney R. Jonathan Hart, Emily E. Garrard) (wwl) (Entered: 06/23/2003)
	* * *	
11/24/2003	10	MOTION by Chatham County, GA for Summary Judgment. (kts) (Entered: 11/26/2003)
11/24/2003	11	MEMORANDUM by Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (kts) (Entered: 11/26/2003)
11/24/2003	12	STATEMENT OF MATERIAL FACTS by defendant Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (kts) (Entered: 11/26/2003)
	* * *	

12/16/2003	17	STATEMENT OF MATERIAL FACTS by plaintiff Zurich Insurance in support of [10-1] motion for Summary Judgment by Chatham County, GA (wwp) (Entered: 12/17/2003)
12/16/2003	18	RESPONSE by plaintiff Zurich Insurance to [12-1] material facts statement by Chatham County, GA (lne) (Entered: 12/17/2003)
12/16/2003	16	RESPONSE by Zurich Insurance to [10-1] motion for Summary Judgment by Chatham County, GA (wwp) Modified on 12/30/2003 (Entered: 12/30/2003)
12/16/2003	16	CROSS MOTION by Zurich Insurance for Summary Judgment (wwp) (Entered: 12/30/2003)
12/16/2003	20	MEMORANDUM by Zurich Insurance in opposition to [10-1] motion for Summary Judgment by Chatham County, GA (wwp) (Entered: 12/30/2003)
12/16/2003	23	NOTICE issued re: [16-1] cross motion for Summary Judgment by Plaintiff (wwp) (Entered: 12/30/2003)
	* * *	
12/29/2003	21	RESPONSE by Chatham County, GA to [16-1] cross motion for Summary Judgment by Zurich Insurance (lne) (Entered: 12/30/2003)

12/29/2003	22	RESPONSE by defendant Chatham County, GA to [17-1] material facts statement by Zurich Insurance (lne) (Entered: 12/30/2003)
01/22/2004	24	MEMORANDUM by Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (lne) (Entered: 01/23/2004)
	* * *	
06/28/2004	27	ORDER denying [16-1] cross motion for Summary Judgment, denying [14-1] motion to Strike [10-1] Affidavit contained in motion for Summary Judgment by Chatham County, GA, granting [10-1] motion for Summary Judgment (signed by Chief Judge William T. Moore); [EOD Date 6/28/04] copies served. (kts) (Entered: 06/28/2004)
06/28/2004	28	JUDGMENT that in accordance with the Court's Order dated 6/28/04, Judgment is hereby entered for Chatham County, GA; [EOD Date 6/28/04] copies served. (kts) (Entered: 06/28/2004)
	* * *	
07/01/2004	29	NOTICE OF APPEAL by Zurich Insurance. FILING FEE $255.00 RECEIPT # 404296; copies served. [28-1] judgment order, [27-1] order (kts) (Entered: 07/02/2004)

	* * *	
02/11/2005	30	MOTION by Zurich Insurance for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment and memorandum of law in support with brief in support. (wwp) (Entered: 02/14/2005)
02/16/2005	31	ORDER denying [30-1] motion for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment. As this case is currently on appeal, the Court does not have jurisdiction to entertain Plaintiff's request. (signed by Chief Judge William T. Moore); [EOD Date 2/16/05] served. (nys) (Entered: 02/16/2005)
03/16/2005	32	JUDGMENT OF USCA (certified copy) AFFIRMED Re: [29-1] appeal by Zurich Insurance (kts) (Entered: 03/17/2005)
	* * *	
03/18/2005	33	ORDERED that the Judgment of the 11th Circuit is made the judgment of this Court. (signed by Chief Judge William T. Moore); [EOD Date 3/21/05] copies served. (wwp) (Entered: 03/21/2005)

03/29/2005	34	SUPPLEMENTAL MOTION (RENEWED RULE 60(b) by Zurich Insurance referring to: [30-1] motion for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment and memorandum of law in support by Zurich Insurance (nys) (Entered: 04/01/2005)
04/11/2005	35	RESPONSE by Chatham County, GA in opposition to [34-1] supplemental motion by Zurich Insurance (bcw) (Entered: 04/13/2005)
05/19/2005	36	RESPONSE in Opposition re 34 Motion for Miscellaneous Relief, 30 Motion for Miscellaneous Relief filed by Chatham County, GA. (jgb) (Entered: 05/20/2005)
05/20/2005	37	SUPPLEMENTAL BRIEF by Zurich Insurance Company. Amendment to 34 Motion for relief from Judgment from this Court's June 28, 2004 Order. (kts) (Entered 05/23/2005)
06/10/2005	38	ORDER denying 34 Motion for Relief from this Court's June 28, 2004 Order granting Defendant Summary Judgment. Signed by Judge William T. Moore on 6/10/05. (kts) (Entered: 06/13/05)

06/30/2005	39	NOTICE OF APPEAL as to 38 Order on Motion for Miscellaneous Relief by Zurich Insurance Company. Filing fee $255, receipt number 406819. (Attachments: # 1 Receipt for Notice of Appeal) (kts) (Entered: 06/30/2005)
	* * *	
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	* * *	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG	)	
Plaintiffs,	)	
vs.	)	Civil Action No. CV 403-099
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

COMPLAINT FOR DAMAGES

ZURICH INSURANCE COMPANY, ("Plaintiff") by and through undersigned counsel, hereby files suit against CHATHAM COUNTY, GEORGIA ("Chatham"), and alleges as follows:

1. This Court has subject matter jurisdiction over this matter under the Admiralty and Maritime Jurisdiction of the United States District Court, 28 U.S.C. §1333. Specifically, this action concerns damage inflicted upon a vessel traversing the navigable waterways of the United States.

2. This is an action for relief within the admiralty and maritime jurisdiction of the United States District Court and is brought pursuant to and within the meaning of Rule 9(h) of the Federal Rules of Civil

Procedure and Supplemental Rules governing admiralty and maritime claims.

3. At all times pertinent hereto, JAMES K. LUDWIG, JR. and CAROL C. LUDWIG ("LUDWIG"), resided at 1013 Lewis O. Gray Drive, Saugus, MA 01906.

4. At all times pertinent hereto, Plaintiff, ZURICH INSURANCE was, and is, a corporation organized under the laws of the State of Maryland.

5. At all times pertinent hereto, CHATHAM COUNTY, Georgia was, and is, a distinct political entity with an identity separate from, but located within, the State of Georgia.

6. At all times material hereto, the Defendant and/or its agents and/or employees:

   a. Owned, operated, supervised and performed physical repairs to the Causton Bluff Bridge in CHATHAM COUNTY, Georgia.

   b. Financially supported, maintained, and financed repairs to the Causton Bluff Bridge using funds allocated by the governing body of CHATHAM COUNTY.

7. At all times material hereto, the Causton Bluff Bridge ("Bridge"):

   a. Existed over the navigable waters of the United States of America

   b. Was an obstruction to navigation of the navigable waters of the United States of America near Savannah, Georgia, specifically the Wilmington River, a/k/a the Atlantic Intercoastal Waterway, a/k/a the Savannah River.

c. Existed within the bounds of CHATHAM COUNTY, Georgia.

d. Was built and operated pursuant to a plan authorized, reviewed and permitted by the United States Coast Guard.

e. Was built and operated subject to a permit authorized by the U.S. Army Corps of Engineers.

f. Was an obstruction to the navigation of the navigable waterway with a vertical clearance beneath the bridge of 21 feet when in a down or closed position, especially when such closure occurred while a vessel was transiting beneath the span of the bridge;

g. Was required to be open for the passage of vessel in accordance with U.S. Coast Guard regulations and 33 C.F.R. §117.353(b)(specifically addressing the Causton Bluff Bridge);

h. Had a known mechanical defect which caused the raised sections of the bridge to slip under certain weather conditions;

i. This mechanical defect was known to CHATHAM COUNTY, and known to have existed for years as it had caused the bridge to strike and damage other vessels; and

j. The mechanical defect was acknowledged by CHATHAM COUNTY as being the proximate cause of other times when the bridge fell on or nearly upon vessels traveling upon the navigable waters of the United States of America.

8. Venue is proper in the United States District Court for the Southern District of Georgia, Savannah Division, as the incident giving rise to this lawsuit occurred on the navigable waters of the United States

and within CHATHAM COUNTY Georgia, and Defendant is a political entity with a separate and distinct political identity existing in the state of Georgia.

9. On October 6, 2002, James K. Ludwig was the owner of the vessel "LOVE OF MY LIFE", a Catalina 400 yacht, 40 feet in length, containing a mast and sail.

10. On October 6, 2002, the LOVE OF MY LIFE was insured under a policy of marine insurance, number YT 98539530, which was issue to James K. Ludwig, Jr. & Carol Caefer by ZURICH Insurance.

11. On October 6, 2002, James K. Ludwig hailed the bridge operator, an employee of Chatham County, for the Causton Bluff Bridge and requested the span be opened to permit the passage of the vessel LOVE OF MY LIFE.

12. The bridge operator complied with the request and opened the span so that the LOVE OF MY LIFE could transit under the bridge.

13. As the LOVE OF MY LIFE was transiting under the bridge, a raised section of the drawbridge dropped and/or closed on top of the LOVE OF MY LIFE's mast.

14. As a result of premature closing, or failure of the mechanical workings of the bridge, the LOVE OF MY LIFE suffered substantial and significant damage to her mast and rigging and hull.

15. Plaintiff has had to expend significant time and monetary resources to repair the damage to the LOVE OF MY LIFE pursuant to the policy of marine insurance issued to Ludwig as a result of the

bridge closing on top of the mast of the LOVE OF MY LIFE.

16. The aforesaid damage was caused solely through the fault, want of care and/or failure to repair or replace a known obstruction to Interstate Commerce and Navigation on the part of the Defendant and/or those whom the Defendant is responsible for as an employer of owner/operator of the Causton Bluff Bridge. Furthermore, aforesaid damage was the result of the operation of said bridge in violation of the terms of the Bridge Permit issued by the U. S. Coast Guard and the regulation contained within 33 C.F.R. §117.353(b), which specifically apply to the operation of the Causton Bluff Bridge.

17. All conditions necessary to bring this action have been satisfied or waived.

18. As a result of the damages sustained by LOVE OF MY LIFE, Plaintiffs have suffered damages in excess of $30,000.00.

COUNT 1:

NEGLIGENCE OF DEFENDANT CHATHAM COUNTY, GEORGIA

Plaintiffs reassert and re-allege the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

19. The Causton Bluff Bridge constitutes an obstruction to navigation of the navigable waterways or be a nuisance to navigation of the United States. The bridge is allowed to obstruct the waterway only if operated in accordance with a permit issued by the U.S. Coast Guard.

20. The permit issued to the Causton Bluff Bridge by the U.S. Coast Guard governs and directs and limits the operation of the bridge as an obstruction to

navigation. Specifically, the bridge must not obstruct or be a nuisance to the navigation of a vessel attempting to transit the bridge's location.

21. On the date in question, the Causton Bluff Bridge did not conform to the bridge permit, i.e. the bridge operations violated the limitations of the U.S. Coast Guard permit, the laws of the federal government, and Georgia state law concerning known nuisances by obstructing the navigation of the LOVE OF MY LIFE and posing a safety hazard which was known to CHATHAM COUNTY but which could not have been discovered by Ludwig or avoided by him had he known of the danger.

22. Defendant, CHATHAM COUNTY, owed Plaintiffs a duty to operate and maintain the Causton Bluff Bridge in a reasonably safe and prudent manner, and to avoid causing damage to vessels which have to traverse the Causton Bluff Bridge which is an obstacle and nuisance to navigation.

23. Defendant, CHATHAM COUNTY, Georgia, breached the duty owed to Plaintiffs in that the Causton Bluff Bridge, which it maintained, negligently struck the LOVE OF MY LIFE, on October 6, 2002.

24. Defendant, CHATHAM COUNTY, Georgia, was negligent in the following respects:

    1. Failing to keep a proper lookout.

    2. Failing to maintain a competent and attentive bridge tender.

    3. Failing to maintain the Causton Bluff Bridge and its machinery in a safe and reasonably prudent manner.

    4. Failing to properly train its bridge tender.

5. Obstructing the navigation of the LOVE OF MY LIFE.

6. Failing to notify vessels of dangerous condition existing as a result of damage to the mechanism of the Causton Bluff Bridge.

7. Failing to correct a known and obvious nuisance.

8. Other acts of negligence which will be proved at the time of trial.

25. Defendant, CHATHAM COUNTY, Georgia's negligence was the direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff.

COUNT II

DEFENDANT CHATHAM COUNTY MAINTAINED A CONTINUING NUISANCE

Plaintiffs re-assert and re-allege the allegations contained in paragraphs 1 through 25 as though fully set forth herein.

26. The Causton Bluff Bridge constitutes an obstruction to navigation of the navigable waterways or be a nuisance to navigation of the United States. The bridge is allowed to obstruct the waterway only if operated in accordance with a permit issued by the U.S. Coast Guard.

27. The permit issued to the Causton Bluff Bridge by the U.S. Coast Guard governs and directs and limits the operation of the bridge as an obstruction to navigation. Specifically, the bridge must not obstruct or be a nuisance to the navigation of a vessel attempting to transit the bridge's location.

28. On the date in question, the Causton Bluff Bridge did not conform to the bridge permit, i.e. the bridge operations violated the limitations or the U.S. Coast Guard permit, the laws of the federal government, and Georgia state law concerning known nuisances by obstructing the navigation of the LOVE OF MY LIFE and posing a safety hazard which was known to CHATHAM COUNTY but which could not have been discovered by Ludwig or avoided by him had he known of the danger.

29. Defendant, CHATHAM COUNTY, owed Plaintiffs a duty to operate and maintain the Causton Bluff Bridge in a reasonably safe and prudent manner, and to avoid causing damage to vessels which have to traverse the Causton Bluff Bridge which is an obstacle and nuisance to navigation.

30. Defendant, CHATHAM COUNTY, Georgia, breached the duty owed to Plaintiffs in that the Causton Bluff Bridge, which it maintained, struck the LOVE OF MY LIFE, on October 6, 2002.

31. The Defendant, CHATHAM COUNTY, Georgia, was aware of the defective condition of the bridge as the bridge had struck and damaged other vessels while the bridge had been elevated to allow similar vessels to ply the river through the bridge.

32. Defendant, CHATHAM COUNTY, Georgia's maintenance of the continuing nuisance was the direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff.

COUNT III

STATUTORY AND/OR REGULATORY FAULT FOR VIOLATION OF THE NAVIGABLE SERVITUDE ENCOMPASSED BY THE U.S. COAST GUARD AND U.S. CORP OF ENGINEER'S PERMITS

Plaintiffs re-assert and re-allege the allegations contained in paragraphs 1 through 32 as though fully set forth herein.

33. The Causton Bluff Bridge was built and operated subject to compliance with permits issued by the U.S. Coast Guard and the U.S. Corp of Engineers as the bridge, with a clearance when closed of only 21 feet, represented an obstruction and/or nuisance to navigation of commerce on the interstate waterways of the United States.

34. The Causton Bluff Bridge was required to be opened and operated in conformance with 33 C.F.R. §117.353(b).

35. The closure of the Causton Bluff Bridge, which spanned the Intercoastal Waterway, while a vessel was transiting beneath said bridge constituted a violation of the U.S. Coast Guard permit, the U.S. Corp of Engineer's permit and the language of 33 C.F.R. §117.353(b).

36. Defendant, CHATHAM COUNTY, Georgia's violation of the U.S. Coast Guard and U.S. Corp of Engineer's permits and the regulations contained in 33 C.F.R. §117.353(b) were a direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff and constituted an obstruction to interstate Commerce.

WHEREFORE, Plaintiffs pray that:

1. Process may be issued against CHATHAM COUNTY, Georgia citing them to appear and answer the Complaint.
2. The Court enter a Judgment against the Defendant for all damages suffered by Plaintiffs together with costs, attorney's fees and prejudgment interest.
3. Plaintiffs request all other equitable relief as justice may require or dictate.

CLARK AND CLARK
/s/
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY, Subrogated to the Rights of JAMES K. LUDWIG and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S ANSWER

NOW COMES CHATHAM COUNTY, GEORGIA ("County") and answers Plaintiff's complaint. The County shows the Court the following:

FIRST DEFENSE

The County is entitled to sovereign immunity.

SECOND DEFENSE

Plaintiff's complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The County has acted in good faith at all relevant times.

FOURTH DEFENSE

Plaintiff's insured proximately caused the alleged damages.

FIFTH DEFENSE

The County answers the numbered paragraphs of Plaintiff's complaint as follows:

1. The County admits the allegations contained in the first sentence of paragraph 1 of Plaintiff's complaint. The County denies the remaining allegations contained in paragraph 1 of Plaintiff's complaint.

2. Answering the allegations contained in paragraph 2 of Plaintiff's complaint, the County admits that Plaintiff has brought this action as an admiralty and maritime case. The County denies the remaining allegations contained in paragraph 2 of Plaintiff's complaint regarding any liability of the County.

3. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of Plaintiff's complaint.

4. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of Plaintiff's complaint.

5. The County denies the allegations contained in paragraph 5 of Plaintiff's complaint. Further answering, the County states that it is a body corporate and politic and is a political subdivision of the State of Georgia.

6. The County admits the allegations contained in paragraph 6 of Plaintiff's complaint and subparagraphs a and b.

7. The County denies the allegations contained in paragraph 7 of Plaintiff's complaint and denies the allegations contained in subparagraphs a through j.

8. Answering the allegations contained in paragraph 8 of Plaintiff's complaint, the County admits that venue is proper in this Court and that an incident occurred at the Causton Bluff Bridge involving a vessel. The County denies the re-

maining allegations contained in paragraph 8 of Plaintiff's complaint.

9. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of Plaintiff's complaint.

10. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of Plaintiff's complaint.

11. Answering the allegations contained in paragraph 11 of Plaintiff's complaint, the County admits that the operator of a sailboat, "Love of My Life," requested that the operator of the Causton Bluff Bridge open the bridge to permit passage of "Love of My Life." The County is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of Plaintiff's complaint.

12. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of Plaintiff's complaint regarding who made a request for the bridge to be opened. Further answering, the County states that the bridge was opened to permit the passage of Love of My Life.

13. The County denies the allegations contained in paragraph 13 of Plaintiff's complaint.

14. The County denies the allegations contained in paragraph 14 of Plaintiff's complaint.

15. The County denies the allegations contained in paragraph 15 of Plaintiff's complaint.

16. The County denies the allegations contained in paragraph 16 of Plaintiff's complaint.

17. The County denies the allegations contained in paragraph 17 of Plaintiff's complaint.

18. The County denies the allegations contained in paragraph 18 of Plaintiff's complaint.

COUNT 1:

NEGLIGENCE OF DEFENDANT CHATHAM COUNTY, GEORGIA

The County incorporates herein by reference its responses to paragraphs 1 through 18 as if fully stated herein

19. The County denies the allegations contained in paragraph 19 of Plaintiff's complaint.

20. The County denies the allegations contained in paragraph 20 of Plaintiff's complaint.

21. The County denies the allegations contained in paragraph 21 of Plaintiff's complaint.

22. The County denies the allegations contained in paragraph 22 of Plaintiff's complaint.

23. The County denies the allegations contained in paragraph 23 of Plaintiff's complaint.

24. The County denies the allegations contained in paragraph 24 of Plaintiff's complaint and denies subparagraphs 1 through 8 of paragraph 24 of Plaintiff's complaint.

25. The County denies the allegations contained in paragraph 25 of Plaintiff's complaint.

COUNT II

DEFENDANT CHATHAM COUNTY MAINTAINED A CONTINUING NUISANCE

The County incorporates herein by reference its responses to paragraphs 1 through 25 as if fully stated herein

26. The County denies the allegations contained in paragraph 26 of Plaintiff's complaint.

27. The County denies the allegations contained in paragraph 27 of Plaintiff's complaint.

28. The County denies the allegations contained in paragraph 28 of Plaintiff's complaint.

29. The County denies the allegations contained in paragraph 29 of Plaintiff's complaint.

30. The County denies the allegations contained in paragraph 30 of Plaintiff's complaint.

31. The County denies the allegations contained in paragraph 31 of Plaintiff's complaint.

32. The County denies the allegations contained in paragraph 32 of Plaintiff's complaint.

COUNT III

STATUTORY AND/OR REGULATORY FAULT FOR VIOLATION OF THE NAVIGABLE SERVITUDE ENCOMPASSED BY THE U.S. COAST GUARD AND U.S. CORPS OF ENGINEER'S PERMITS

The County incorporates herein by reference its responses to paragraphs 1 through 32 as if fully stated herein

33. The County denies the allegations contained in paragraph 33 of Plaintiff's complaint.

34. The County denies the allegations contained in paragraph 34 of Plaintiff's complaint.

35. The County denies the allegations contained in paragraph 34 of Plaintiff's complaint.

36. The County denies the allegations contained in paragraph 36 of Plaintiff's complaint.

WHEREFORE, the County respectfully requests that the Court dismiss Plaintiff's complaint.

Respectfully submitted this 20th day of June, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY Subrogated to the Rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV 403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED AND CONCLUSIONS OF LAW

NOW COMES CHATHAM COUNTY, GEORGIA ("County") pursuant to Local Rule 56.1 and shows the Court the following:

1. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. (Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (*Id.*) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (*Id.*, Exh. 1)

2. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington

River. (Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. (*Id.*) The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (*Id.*) The County employs bridge tenders to open the bridge for that purpose. (*Id.*) The Bridge is not used as a navigational aid. (*Id.*)

3. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (*Id.*) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (*Id.*) The County derives no income from operating and maintaining the Bridge. (*Id.*)

4. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. (Aff. Drewry, ¶ 6) When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. (*Id.*) At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. (*Id.*) The spans do not make contact with the water. (*Id.*)

5. The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (*Id.*) There has been no additional construction or reconstruction to the Bridge since the 1980's. (*Id.*)

6. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. (Aff. Bowers, ¶ 3)

7. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (Aff. Bowers, ¶ 4)

8. On October 6, 2002, the bridgetender opened the Bridge pursuant to Mr. Ludwig's request. (Aff. Bowers, ¶ 5)

9. The bridgetender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (Aff. Bowers, ¶ 6)

10. The bridgetender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (Aff. Bowers, ¶ 7)

11. The bridgetender stopped the span and started it back up; however, the Love of My Life hit the span. (Aff. Bowers, ¶ 8)

12. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (Aff. Bowers, ¶ 9)

13. Chatham County is entitled to sovereign immunity as to Plaintiff's federal admiralty claim.

14. Chatham County is entitled to sovereign immunity as to any state tort claim.

Respectfully submitted this 24th day of November, 2003.

/s/

R. JONATHAN HART
State Bar No. 333692
EMILY E. GARRARD
State Bar No. 286180

ATTORNEYS FOR CHATHAM COUNTY, GEORGIA

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY, Subrogated to the Rights of JAMES K. LUDWIG and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

NOW COMES CHATHAM COUNTY, GEORGIA ("County") in support of its motion for summary judgment and shows the Court the following:

I. FACTS

Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by Chatham County. (Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (*Id.*) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (*Id.*, Exh. 1)

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington

River. (Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights and pivot and braking mechanisms for each half of the span. (*Id.*)

The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (*Id.*) The County employs bridge tenders to open the bridge for that purpose. (*Id.*) The Bridge is not used as a navigational aid. (*Id.*)

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (*Id.*) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (*Id.*) The County derives no income from operating and maintaining the Bridge. (*Id.*)

The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. (Aff. Drewry, ¶ 6) When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. (*Id.*) At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. (*Id.*) The spans do not make contact with the water. (*Id.*)

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (*Id.*) There has been no additional construction or reconstruction to the Bridge since the 1980's. (*Id.*)

On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. (Aff. Bowers, ¶ 3) On that date, Mr. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (*Id.*, ¶ 4)

On October 6, 2002, the bridge tender opened the Bridge pursuant to Mr. Ludwig's request. (Aff. Bowers, ¶ 5) The bridge tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (*Id.*, ¶ 6) The bridge tender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (*Id.*, ¶ 7)

The bridge tender stopped the span and started it back up; however, the Love of My Life hit the span. (Aff. Bowers, ¶ 8) The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (*Id.*, ¶ 9)

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. CHATHAM COUNTY, GEORGIA IS ENTITLED TO SOVEREIGN IMMUNITY IN AN ADMIRALTY CASE[1].

The County has found no law which states that counties are not entitled to sovereign immunity in an admiralty case.

In *Broward County, Florida v. Wickman*, 195 F.2d 614[2] (5th Cir. 1952), a yacht was damaged after striking an underwater projection that was part of the abutment of a drawbridge owned and operated by Broward County. Suit was brought in personam in admiralty against Broward County. *Id.* Broward asserted that as a political subdivision of the state it was entitled to immunity. *Id.* at 614-615. The Court held that Broward County as a political subdivision of Florida was immune from suit in admiralty. *Id.* at 615 (citing *Ex parte State of New York*, 256 U.S. 490 (1921)).

Chatham County is a political subdivision of the State of Georgia. *Holmes v. Chatham Area Transit Authority*, 234

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[1] Although some case law suggests otherwise, the County assumes that admiralty law applies in this case. *See Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103, 1114 (E.D. La. 1993), stating that an injury that is caused by shore-based equipment or negligence is not within admiralty jurisdiction, even if the injury takes place over navigable water (citing Fifth Circuit case, *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1977)). *See also*, however, 134 ALR Fed 137, § 2 (a) which states that in vessel-bridge collisions, the basic law applicable to admiralty and maritime matters applies.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Ga. App. 42, 45 (1998); *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 41 (1994); *Wojcik v. State*, 260 Ga. 260, 262 (1990). The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article, 9, § 2, ¶ 3(a)(4), authorizes counties to provide for street and road construction and maintenance. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1 (a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1 (b). O.C.G.A. § 32-4-42 sets forth the powers of counties regarding its county road system and refers to public roads. The definition of "public road" includes bridges. O.C.G.A. § 32-1-3 (24)(B).

The County acknowledges that Eleventh Amendment immunity does not extend to counties. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). The Court in *Wickman*, however, had available to it the U.S. Supreme Court case of *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), which stated that counties are not protected by the Eleventh Amendment from suit in federal court.

It appears that the immunity afforded under *Wickman* is not based on principles of Eleventh Amendment immunity but is based on the universal rule of state immunity from suit without the state's consent. *Wickman*, *supra*; *Ex parte State of New York*, *supra*. The Eleventh Amendment explicitly applies to suits in law or equity, not admiralty. Additionally, *Wickman* is cited in 134 ALR Fed[3] 537, § 2 (b) and 2 Am Jur 2d, Admiralty[4], §51, as authority that the exemption of states

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[3] 134 ALR Fed was published in 1996.

[4] 2 Am Jur 2d, Admiralty, was published in 1994.

from suits in admiralty applies to state subdivisions such as counties.

By contrast, it appears that case law makes a distinction between the liability of counties and cities in admiralty cases because municipal corporations under local charters perform corporate functions in building and operating bridges, and counties exercise delegated state powers and governmental functions in the construction and maintenance of roads and bridges. *See Pelican Marine Carriers, Inc.*, 791 F. Supp. 845, 856 (M.D. Fla. 1992), aff'd without opinion 4 F.3d 999 (11th Cir. 1993), citing a line of cases addressing laws applicable to municipal corporations. *See also* 2 Am Jur 2d, Admiralty, § 51, and 134 ALR Fed 537, § 2 (b).

The County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by the State of Georgia in 1784, protected governments at all levels from unconsented-to legal actions. *Gilbert v. Richardson*, 264 Ga. 744, 745-746 (1994).

Common law sovereign immunity afforded to states does not derive from and is not limited by the Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 713 (1999). States have been afforded sovereign immunity before and after the adoption of the Eleventh Amendment. *Id.* The adoption of the Eleventh Amendment was not intended to limit sovereign immunity to the "narrow text of the Eleventh Amendment...." *Id.* at 723-724. *See also Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 753 (2002) ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). The Court in *Alden* stated that sovereign immunity does not extend to lesser entities which are not arms of the state. *Alden*, *supra*, at 756-757. Chatham County as a political subdivision of the State of Georgia, however, enjoys the same sovereign immunity in

this case. *Broward County, Florida v. Wickman*, 195 F.2d 614, 615 (5th Cir. 1952).

B. CHATHAM COUNTY IS ENTITLED TO SOVEREIGN IMMUNITY IN A STATE LAW TORT CASE.

The Court has diversity jurisdiction in a state law tort case. Paragraphs 3 and 4 of the complaint reflect that there is diversity of citizenship. Under the Erie doctrine, a federal court with diversity jurisdiction must apply the substantive law of the state. *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938).

Ga. Const. Art. 1, § 2, ¶ 9(e) provides:

> "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can *only* be waived by an Act of the General Assembly which *specifically* provides that sovereign immunity is thereby waived and the extent of such waiver." (emphasis added)

This Constitutional provision, which amended the 1983 Constitution, applies to counties. *Gilbert v. Richardson*, 264 Ga. 744, 746-747 (1994). The County's sovereign immunity can *only* be waived by a *specific act* of the General Assembly. Ga. Const. Art. 1, § 2, ¶ 9 (e); *Gilbert, supra*. This Constitutional provision became effective on January 1, 1991, and therefore applies because the incident at issue occurred on October 6, 2002.

Sovereign immunity "can *only* be waived pursuant to a *legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.*'" *Woodard v. Laurens County, Ga.*, 265 Ga. 404, 405 (1995) (citing *Gilbert, supra*, at 748). (emphasis added) It cannot be waived by the mere purchase of insurance coverage. *Id.* In *Gilbert*,

the Gilberts sued the Walker County Sheriff. *Gilbert, supra*, at 745. In *Gilbert*, the county's sovereign immunity was waived pursuant to O.C.G.A. § 33-24-51(b) to the extent of the amount of liability insurance *purchased* for the negligence of county officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle and pursuant to O.C.G.A. § 36-85-1 which authorizes counties to participate in GIRMA. *Gilbert, supra*, at 748-749, 751-752.

The County has not waived its sovereign immunity pursuant to any legislative act because it does not participate in GIRMA nor has it purchased any liability insurance for claims arising from the use of a motor vehicle with the exception of insurance coverage for ambulances which was discontinued in 1998. (Aff. Voelker) *See also Woodard, supra*, and *Long v. Hall County Board of Commissioners*, 219 Ga. App. 853, 856-857 (1996). The County does not have any insurance for bridges. (Aff. Voelker)

Although Plaintiff asserts in the joint status report that the General Assembly has waived sovereign immunity for damages caused by county maintained bridges, the County has located no legislative act which waives the County's immunity for the alleged incident involving the Causton Bluff Bridge. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850 (1996).

O.C.G.A. § 32-4-71(b) provides in relevant part that if "the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county... ." O.C.G.A. § 32-4-70 (b) provides in relevant part that "[w]here the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the per-

formance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years." The Causton Bluff Bridge was constructed in 1963 and in the 1980's a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (Aff. Drewry, ¶ 7) Therefore this provision does not apply.

Plaintiff cannot rely on *Coweta County v. Adams*, 221 Ga. App. 868 (1996). It involved claims that accrued before the effective date of the 1991 amendment to Article 1, § 2, ¶ 9 of the Georgia Constitution. *Id.* at 869. Its holding is limited to its facts and does "not judicially create liability for counties in Georgia for negligence claims relating to bridges... . Under current law, negligent bridge claims are essentially foreclosed by sovereign immunity, and no county liability was created by O.C.G.A. § 32-4-1 *et seq.*" *Id.* (citing *Kordares*, *supra*).

III. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted this 24th day of November, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180

ATTORNEYS FOR CHATHAM
COUNTY, GEORGIA

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

[EXHIBIT A TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

AFFIDAVIT OF ROBERT DREWRY

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, ROBERT DREWRY, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as the Director of Public Works and Park Services. My department is responsible for operating and maintaining the bridges which are owned by the County.

3. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. The Bridge is permanently connected to the roadway of Islands Expressway. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. A copy of an aerial photograph showing the Bridge is attached hereto as Exhibit 1.

4. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles

with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the bridge for that purpose. The Bridge is not used as a navigational aid.

5. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. There is no charge to anyone for crossing the Bridge. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. The County derives no income from operating and maintaining the Bridge.

6. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. The spans do not make contact with the water.

7. Official records maintained in the ordinary course of business in the Public Works and Park Services Department show that the Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. There has been no additional construction or reconstruction to the Bridge since the 1980's.

Further deponent sayeth naught.

/s/
ROBERT DREWRY (L.S.)

Sworn to and subscribed before me,
this 10th day of November, 2003

/s/
NOTARY PUBLIC

DAWN P. CARTER
Notary Public, Effingham County, GA
My Commission Expires May 9, 2005

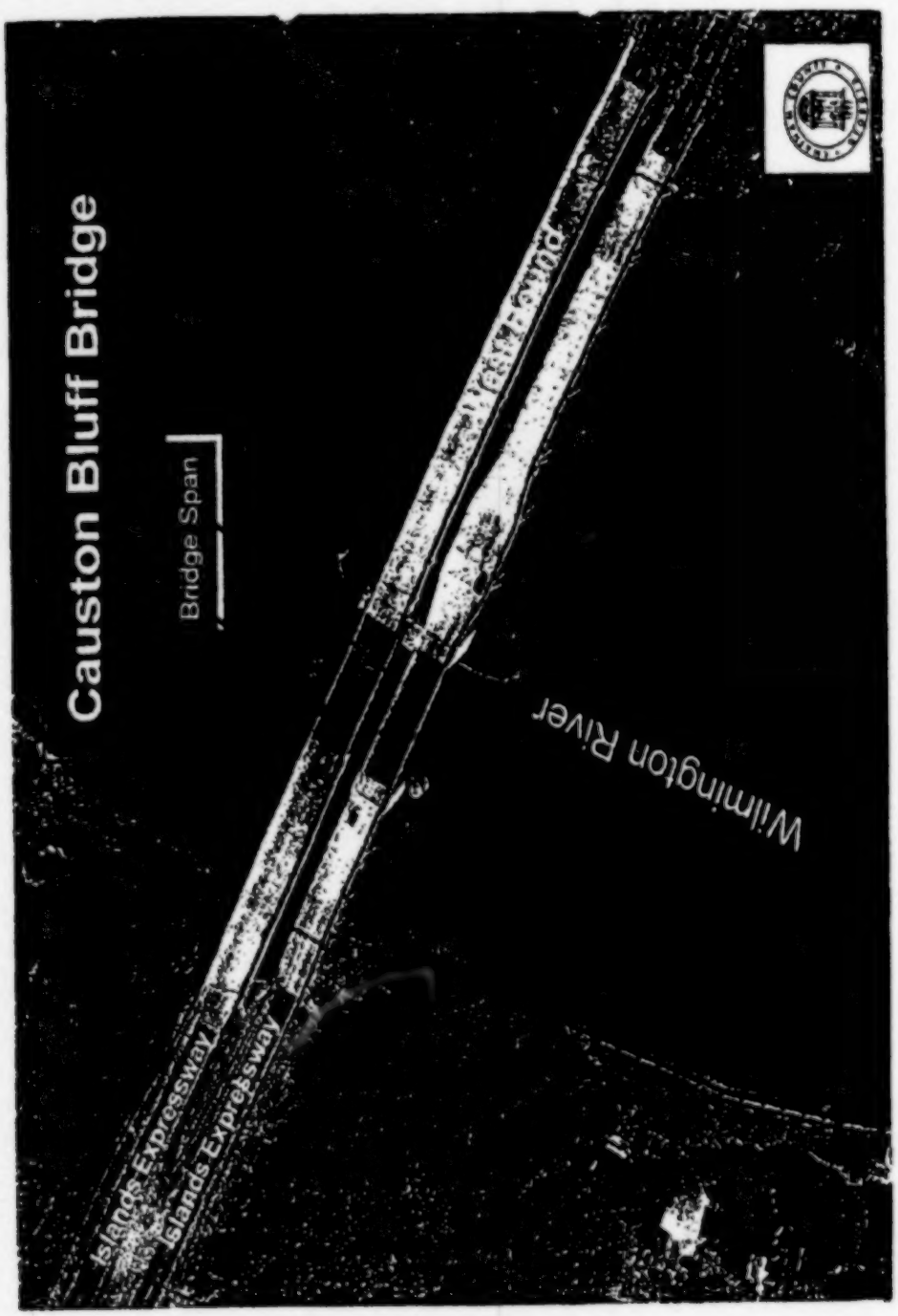
Causton Bluff Bridge
Bridge Span
Wilmington River
Islands Expressway
Islands Expressway

EXHIBIT 1

[EXHIBIT B TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

AFFIDAVIT OF WESLEY BOWERS

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, WESLEY BOWERS, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as a bridge tender. I work in the bridges section of the Public Works and Parks Services Department. I sit in the bridge house of County bridges and open the bridges upon request from captains of vessels.

3. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, I was the bridge operator of the Causton Bluff Bridge ("Bridge").

4. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge.

5. On October 6, 2002, I opened the Bridge pursuant to Mr. Ludwig's request.

6. I noticed that the north west span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig.

7. I was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area.

8. I stopped the span and started it back up; however, the Love of My Life hit the span.

9. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge.

Further deponent sayeth naught.

/s/
WESLEY BOWERS (L.S.)

Sworn to and subscribed before me,
this 18th day of November, 2003

/s/
NOTARY PUBLIC

PATRICIA A. WASHINGTON
Notary Public, Chatham County, GA
My Commission Expires June 17, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	No. 403-099
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court pursuant to F.R.C.P. 56 for a Summary Judgment in favor of Plaintiffs on the ground that there is no genuine issue as to any material fact and Plaintiffs are entitled to Judgment as a matter of law, as more fully appears from the pleadings and affidavits attached hereto.*

CLARK, CLARK & STEINMETZ

/s/
FRED S. CLARK
GA BAR 126800
ATTORNEY FOR PLAINTIFFS

P. O. Box 8151
Savannah, GA 31412
Tel: (912) 233-0300
Fx: (912) 233-9110

* Some of the exhibits are taken from the pleadings in the case of *Rings, et al v. Chatham County*, U.S. District Court Case Number CV403-038. The parties have agreed that the documents used in that case may also be used in the instant case. The Court is permitted to take judicial notice of records and the pleadings in other cases. *National Fire Insurance Company v. Thompson*, 281 U.S. 331, 50 S.Ct. 288, 74 L.Ed. 881.

[EXHIBIT 9 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

Department of Transportation
District Five
Jesup, Georgia 31598

December 16, 1998

MR. JOHN SHUMAN
U.S. CORPS OF ENGINEERS
SAVANNAH DISTRICT OFFICE
POST OFFICE BOX 889
SAVANNAH, GEORGIA 31402

DEAR MR. SHUMAN:

I HAVE RECEIVED A COPY OF A FAX FROM MR. LARRY SEABROOK, DIRECTOR OF OPERATIONS WITH THE GEORGIA DEPARTMENT OF TRANSPORTATION, THAT YOU SENT HIM IN REFERENCE TO A PROBLEM WITH THE SAM VARNEDOE BRIDGE ON THE WILMINGTON RIVER. SPECIFICALLY, MR. PETE W. TUCKER HAS EXPRESSED HIS CONCERN THAT THE BRIDGE WAS NOT OPENED ON REQUEST ON DECEMBER 1, 1998.

PLEASE BE ADVISED THAT THIS STRUCTURE IS ON PRESIDENT STREET AND IS OPERATED BY CHATHAM COUNTY AND NOT THE GEORGIA DEPARTMENT OF TRANSPORTATION.

I AM FORWARDING A COPY OF THE CORRESPONDENCE TO THE CHATHAM COUNTY ENGINEER, WITH WHOM YOU MAY WANT TO FOLLOW UP WITH, CONCERNING THIS MATTER.

YOURS VERY TRULY,
/S/
GARY D. PRIESTER
DISTRICT ENGINEERS

GDP:cah

CC: MR. LARRY SEABROOK, DIRECTOR OF OPERATIONS – D.O.T.
MR. AL BUNGARD, P.E., CHATHAM COUNTY ENGINEER -
W/ATTACHMENT
MR. PETE TUCKER, CAPTAIN, FOURTH QUARTER

[EXHIBIT 10 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

CASE NO.: CV-403-038

DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY

-Plaintiffs, *

Verse *

CHATHAM COUNTY, GEORGIA * and the Georgia Department of Transportation *

-Defendant *

_____ /

DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY
SECOND SET OF REQUESTS FOR ADMISSION TO CHATHAM COUNTY, GEORGIA

COMES NOW, DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY, through undersigned counsel, pursuant to the Federal Rules of Civil Procedure and the Local Rules for the Southern District of Georgia, Savannah Division, and respectfully submits the following Requests for Admission to Chatham County.

1. Please admit that Chatham County, Georgia was the party that submitted the proposal and/or proposed plans for the Causton Bluff Bridge to the United States Army Corp of Engineers.

2. Please admit that Chatham County, Georgia was the party that submitted the proposal and/or proposed plans or the second span of the Causton Bluff Bridge to the United States Army Corp of Engineers.

3. Please admit that the United States Coast Guard is responsible for regulating the operation of (a) obstructions to navigations; (b) bridges over navigable waters in general and (c) the Causton Bluff Bridge.

4. Please admit that 33 C.F.R. §117.353(b) mandates when the bridge must open and close in order to permit navigation of the waterways beneath the Causton Bluff Bridge.

5. Please admit that 33 C.F.R. §117.353(b) requires the Causton Bluff Bridge to open on signal, except that from 6:30 a.m. to 9 a.m. and 4:30 p.m. to 6:30 p.m. Monday through Friday, except Federal holidays the draw need open only at 7:a.m., 8 a.m, and 5:30 p.m.

6. Please admit that Dennis K. Rings contacted the bridge operator on December 8, 2000 and requested that the bridge be raised to permit his vessel, the S/V MOXSUN to transit the waters beneath the Causton Bluff Bridge.

7. Please admit that the Causton Bluff Bridge was opened in response to Mr. Ring's December 8, 2000 request.

8. Please admit that while Mr. Ring's vessel, S/V MOXSUN, was passing beneath the Causton Bluff

Bridge, it was struck by the descending draw or span of the Causton Bluff Bridge.

9. Please admit that as a result of the Causton Bluff Bridge striking the S/V MOXSUN, the vessel sustained physical damage.

10. Please admit that the physical damage sustained by the S/V MOXSUN on December 8, 2000 was the result of the lowering bridge span striking the mast of the S/V MOXSUN.

11. Please admit that composite exhibit "A" establishes that $75,589.03 has been paid in this matter by Continental Insurance Company to Mr. Rings or to venders performing repairs to his vessel.

12. Please admit that Continental Insurance Company is subrogated to Mr. Ring's rights to recover $75,589.3 plus interest for the losses sustained by Mr. Rings' vessel.

13. Please admit that any judgment against Chatham County, in this matter, would not be satisfied by funds received:

    a) from the State of Georgia as part of general revenue funds provided to the county;

    b) from the State of Georgia as part of funds which are directly earmarked for the payment of this judgment;

    c) from the State of Georgia as part of funds which are earmarked for the payment judgments in general.

14. Please admit that Chatham County, Georgia made payments in excess of $30,000.00 directly to certain vendors performing repairs to the S/V MOXSUN between December 1, 2000, and the current date.

15. Please admit that these payments were made on a voluntary basis and not as a result of any judgment issued against Chatham County, Georgia.

16. Please admit for each time period below that the money which Chatham County spent on maintenance of, and repairs to, the Causton Bluff Bridge was not allocated from funds which Chatham County originally received from the State of Georgia.

    a) from 1995-2000; and

    b) from 2000 until the present.

17. Please admit that these repairs were being performed in connection with damage sustained when the Causton Bluff Bridge struck the mast or rigging of the S/V MOXSUN.

18. Please admit that Chatham County, Georgia was received no funds from the State of Georgia which were designated for the operations, maintenance or repair of the Causton Bluff Bridge.

[EXHIBIT 10 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CONTINENTAL INSURANCE COMPANY, Subrogated to the rights of DENNIS K. RINGS,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV 403-038
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

NOW COMES CHATHAM COUNTY, GEORGIA ("County"), pursuant to Fed. R. Civ. P. 36, and responds to Plaintiff's second request for admissions.

1. Denied. By way of further answer, the County states that the first span of the Causton Bluff Bridge was constructed circa 1964. Additionally, the design work was performed by the Georgia Department of Transportation.

2. Denied. By way of further answer, the County states that the second span was designed and installed by the Georgia Department of Transportation and was turned over to the County upon completion.

3. Upon information and belief, admitted. By way of further answer, the County states that counsel has searched for the statutes or regulations for confirmation of the matters requested to be admitted in this paragraph and has not located the applicable provisions.

4. Admitted.

5. Admitted. By way of further answer, the County states that the restricted hours are correct with the exception that an opening will be granted for a vessel waiting at the bridge at 7:00 a.m., 8:00 a.m. and 5:30 p.m. or for a government vessel or tug and tow.

6. Admitted.

7. Admitted.

8. Denied in part. By way of further answer, the County states that the span was drifting and struck the S/V Moxsun.

9. Denied in part. By way of further answer, the County states that the S/V Moxsun sustained physical damage when the drifting span of the Causton Bluff Bridge struck the S/V Moxsun.

10. Denied in part. By way of further answer, the County states that the S/V Moxsun sustained physical damage when the drifting span of the Causton Bluff Bridge struck the mast of the S/V Moxsun.

11. The County cannot admit Request for Admission 11. The County has made reasonable inquiry and the information known or readily obtainable by the County is insufficient to enable the County to admit or deny. The documents provided do not clearly reflect that the payments were made for repairs to Plaintiff's boat.

12. The County cannot admit Request for Admission 12. The County has made reasonable inquiry and the information known or readily obtainable by the County is insufficient to

enable the County to admit or deny. The County has served additional discovery to obtain further information.

13. Admitted.

14. Admitted. By way of further answer, the County states that on January 12, 2001, a payment in the amount of $7,170.50 was made to Ortego River Boat Yard, 4451 Herschel Street, Jacksonville, Florida 32210 and on this same date, a payment in the amount of $28,379.15 was made to Cambridge Sail Loft and Rigging, 6610 Lennox Avenue, Jacksonville, Florida 32205.

15. Admitted.

16. Admitted.

17. Denied. By way of further answer, the County is unclear if the information requested is for the repairs to the Moxsun or to the Causton Bluff Bridge.

18. Admitted.

This 11th day of September, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180
ATTORNEYS FOR DEFENDANT

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

[ATTACHMENT TO DEFENDANT'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CONTINENTAL INSURANCE COMPANY,
subrogated to the rights of
DENNIS K. RINGS,

Plaintiff,

v. 403CV038

CHATHAM COUNTY, Georgia

Defendant.

ORDER

I. INTRODUCTION

Plaintiffs Dennis K. Rings and his insurer, Continental Insurance Company ("CIC," on subrogation) bring this *in personam* vessel-damages admiralty action against Chatham County, Georgia, an intercoastal waterway draw bridge owner/operator. Doc. # 1. The County concedes that when it raised its bridge one of its bridge spans struck and damaged Ring's vessel while it passed beneath, but moves for summary judgment on sovereign immunity grounds. Doc. # 25. Plaintiffs move for summary judgment against the County, insisting that no such immunity applies and that the County's negligence supports their recovery. Doc. # 21.

II. BACKGROUND

The County owns and operates the "Causton Bluff Bridge," which is part of a multi-lane public road connecting Savannah, Georgia with outlying islands. Doc. # 16 exh. A ¶¶ 3-5. The taxpayer-funded, non-revenue collecting/generating bridge crosses over an intercoastal waterway. *Id.*

Emphasizing that taxpayers pay to maintain/operate the bridge and that it collects no revenue from it, the County insists it exercised delegated State power while operating the bridge on the day it damaged Rings's vessel. Doc. # 18 at 2; # 16 ¶¶ 3-6. Mindful that counties have been held to have waived sovereign immunity to the extent they have purchased insurance, the County also points out that it has no insurance for bridge mishaps. Doc. # 16 exh. C.

III. ANALYSIS

A. Sovereign Immunity

The County is "*not* asserting sovereign immunity based on the Eleventh Amendment immunity,"[1] doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-

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[1] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. *See U.S. v. Texas Tech Univ.*, 171 F.3d 279, 285 n. 9, 288 (5th Cir. 1999) (Eleventh Amendment immunity deprives court of subject matter jurisdiction); *id.* at 285 ("While often noted for preserving state sovereignty, the Amendment only accomplishes this end through jurisdictional limitation").

15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("FMC"). *Id.* at 2-3.

Retracing the *pre*-Eleventh Amendment, "none-can-sue-the-king" sovereign immunity in *FMC*, that court characterized it as "residual and inviolable sovereign immunity." 535 U.S. at 570 (quotes and cite omitted). States, that court explained, ceded to the federal government (under Article I of the U.S. Constitution) only so much of their sovereignty as was necessary to form the United States of America. *Id.* at 572. Hence, "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999).

But this sovereign immunity was placed "into peril" when *Chisholm v. Georgia*, 2 Dall. 419 (1793), held that Article III of the Constitution authorized citizens of one State to sue another in federal court. *FMC*, 535 U.S. at 752. Congress and the States overturned *Chisholm* by passing the Eleventh Amendment. *See supra* note 1.

In choosing that Amendment's text, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States," but chose only "to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (quotes and cite omitted).

Otherwise, "the sovereign immunity enjoyed by the States extends *beyond* the literal text of the Eleventh

Amendment." *Id.* at 754 (emphasis added).[2] The Eleventh Amendment was passed simply to restore the original constitutional design (*i.e.*, States were to retain their residual sovereign immunity and thus could not be sued in any court absent their consent). *Alden*, 527 U.S. at 713-30.

The *FMC* court held that State sovereign immunity bars the Federal Maritime Commission from adjudicating complaints filed by a private party against a nonconsenting State. *Id.* at 769. In other words, the State's sovereign immunity in that case precluded the Federal Maritime Commission from adjudicating a private party's complaint that the State-run port had violated the Shipping Act of 1984. *Id.* Absent its consent, then, a State cannot be "sued" in an agency tribunal, either.

It should be no surprise, then, that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent is clear." *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), *reaffirmed in FMC*, 535 U.S. at 754, 767.[3]

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[2] Too, the Supreme Court has strengthened State sovereign immunity in recent years. See *Alden*, 527 U.S. at 712 ("the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Congress lacks power under Article I to abrogate States' sovereign immunity from suits commenced or prosecuted in federal courts).

[3] "While [such] immunity from suit is not absolute, the Supreme Court has recognized only two situations where an individual may sue a state: where suit is authorized by Congress in the exercise of its power to enforce the Fourteenth Amendment, and where a state has waived its sovereign immunity by consenting to suit." 2 MODERN TORT LAW: LIABILITY AND LITIGATION § 16:6 n. 1 (*State*

[Footnote continued on next page]

Here the County insists that it is a political subdivision of the State, so the Court should deem it immune under the above reasoning, as well as that set forth in *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952) (A Florida county, as a political subdivision of State, was immune in absence of consent from suit in admiralty for damages which resulted when yacht struck an underwater projection which was part of abutment of drawbridge, owned by county, through which yacht was passing). Doc. # 25 at 3.

The *Broward County* court did not cite the Eleventh Amendment, but did cite *New York* and *Workman v. City of New York*, 179 U.S. 552, 570 (1900), to conclude that a Florida county which owned/operated a public bridge using power delegated from the State enjoyed sovereign immunity *from admiralty process*, 195 F.2d at 615, which is functionally the same as saying "immune from admiralty suit."

The result there was not, that court pointed out, inconsistent with *Workman*'s holding that State immunity law could not trump substantive admiralty law over New York City, where "it was *assumed* that the City ... was subject to admiralty process." *Id.* (emphasis added). Thus, although it did not expressly say so, the *Broward County* court applied "residual sovereign immunity" to immunize Broward county from the admiralty claims there.

[Footnote continued from previous page]

Governmental Immunity—in General) (2d ed. Aug. 2003). Otherwise, "Congress lacks power under Article I to abrogate states' sovereign immunity from suits commenced or prosecuted in federal court.... [It also] lacks power under Article I to subject a nonconsenting state to private suits for damages in its own courts as well." *Id.* § 16.6.

At the same time, that court respected the rule, emanating from prior Supreme Court precedent, that where a city or some other municipal entity is otherwise before an admiralty court, admiralty law will preempt State immunity or limitation laws. 195 F.2d at 615.[4]

B. "Part of the State"

The bottom line, then, is this: Whatever government entity is being sued, the first line of inquiry is whether it may be deemed a part of the State (a subdivision, agency, etc., exercising actual or delegated State power). If it can be so deemed, then that defendant may invoke residual sovereign immunity, of which Eleventh Amendment immunity may be viewed as a mere subset. *See Principe Compania Naviera, S. A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (Under Eleventh Amendment, court does not have jurisdiction to entertain a suit in admiralty against state or state agency which is an *integral part* of the state government; so, admiralty actions against *counties*,

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[4] *Workman* is thus best viewed as a preemption (*i.e.*, federal admiralty law preempts conflicting state law) case:

> Thus, state laws which defeat existing maritime rights or enlarge existing maritime liabilities are traditionally preempted. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (state statute of frauds may not be applied to defeat maritime breach of contract claim); *see also State of Md. Dept. of Natural Resources v. Kellum*, 51 F.3d 1220, 1226-28 (4th Cir. 1995) (applying admiralty preemption doctrine to prevent application of state statute that purported to increase the existing standard of care under maritime law in certain maritime tort actions).

Great Lakes Dredge and Dock Co. v. City of Chicago, 1996 WL 210081 at * 1 (N.D. Ill. 1996) (unpublished).

municipalities and other lesser governmental agencies and corporations which have an existence independent of state are not within the Eleventh Amendment's purview; since board of commissioners of the Port of New Orleans is not the state of Louisiana, the Eleventh Amendment did not bar invocation of admiralty jurisdiction in a shipowner's action against the Board for a maritime tort); *J. Ray McDermott & Co. v. Dep't of Highways, State of La.*, 267 F.2d 317, 318 (5th Cir. 1959) (applying "residual sovereign immunity" only -- hence, not Eleventh Amendment immunity -- to hold that State highway department could not be made to stand in judgment in a tort action in admiralty arising out of collision of libellant's barges with a bridge on a highway maintained by the department since the department is a department of the state which has not given its consent to be sued).

If the entity in question is not part of the State, then it does not matter if it claims to have been exercising a "governmental function." It remains amenable to *in personam* admiralty process and thus may be recovered against in admiralty court. To summarize:

> The rule of nonliability for torts where a *municipality* [*i.e.*, a city, not necessarily a county] is exercising a purely governmental function is *not* enforced in the admiralty courts. The United States Supreme Court has held [in *Workman*, 179 U.S. at 570] that "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." [*Id.*] The United States Supreme Court has announced the doctrine that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or

> thing. [In contrast,] *a quasi-municipal corporation, if immune from process in the state, would be immune from process in a suit in admiralty for a maritime tort.*

18 MCQUILLIN MUN. CORP. § 53.25 (3rd ed. Aug. 2003) (footnotes omitted; emphasis added); *Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1110 (N.D. Cal. 2002) ("[i]t has long been settled that a federal court exercising admiralty jurisdiction must respect a *state*'s sovereignty") (emphasis added) (citing *New York*, 256 U.S. at 497-500; (1921); *Workman*, 179 U.S. at 566).

Sovereign-immunity determining courts, then, typically inquire whether the governmental entity being sued was exercising power delegated from the State, as opposed to acting in proprietary way (like a private corporation that constructs a bridge and charges tolls):

> Not all public entities are possessed of the attributes of sovereignty that the state possesses. Lower courts are to determine a public entity's sovereignty "not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. at 500, 41 S.Ct. 588. *See also Workman*, 179 U.S. at 570, 573-74, 21 S.Ct. 212 (city is not a sovereign and may be sued in admiralty despite state law holding city immune from such suits).

Michaeledes, 202 F. Supp. 2d at 1111. Substance trumped nomenclature in *Michaeledes* because the action there in fact was against "'a municipal corporation or other governmental entity which is not an arm of the State.'" *Id.* (quoting *Alden*, 527 U.S. at 756); *see also id.* at 1112-13 (Golden Gate Bridge, Highway and Transportation District, although a "public entity" under California Tort Claims Act, was *not* an

"arm of the state" entitled to assert sovereign immunity defense against injured employee's federal-court unseaworthiness claim; there was no evidence that judgment against District would be enforceable against state and no evidence that state exercised any decision-making authority for District or had any supervisory responsibility for District).

The issue at this juncture, then, is whether Chatham County has acted as a proprietary bridge operator or as an arm of the State. Under the narrower slice of sovereignty preserved by the Eleventh Amendment, case law allows county sheriff departments exercising State power to switch (county versus State) hats to invoke *Eleventh Amendment* immunity, depending on which sort of power they exercise:

> In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003); *accord Vierling*, 339 F.3d at 1314 ("Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit") (quotes and cite omitted).

But *Manders* and *Vierling* focused on the narrower, Eleventh Amendment immunity,[5] not the broader swath of

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[5] Again, the County is *not invoking* the Eleventh Amendment, except in the sense that it may be viewed as a subset of residual sovereign immunity (though, as noted *supra* note 1, that Amend-

[Footnote continued on next page]

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ment also is viewed as an express, federal-court-jurisdiction-limiting response to *Chisholm*).

In any event, the Court acknowledges precedent showing that defendants invoking Eleventh Amendment immunity must prove its applicability. *Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001). In contrast to "residual sovereign immunity," that ordinarily takes some doing. *See Vierling*, 339 F.3d at 1314-15; *Grimshaw v. South Florida Water Management Dist.*, 195 F. Supp. 2d 1358, 1363-65 (S.D. Fla. 2002) (Regional water management district was arm of State of Florida entitled to Eleventh Amendment immunity; Florida legislature defined districts as operating under state control to perform state function with regional component, Florida exercised virtually absolute control over district's personnel, budget, policies and operations, Florida provided substantial portion of district's funds and exercised budget item control over all its resources, and, as practical matter, state's treasury was directly implicated by any judgment against district, both through budget and importance to State's future of maintaining financial viability of district).

Here, unsurprisingly, the County cites little compared to the water-management district's showing in *Grimshaw*. It points out that "taxpayer" dollars fund the bridge, doc. # 17 at 1-2, but does not indicate whether *State* versus *County* tax dollars are used (though, the State does authorize it to collect taxes). It also points out that Georgia law authorizes counties to provide for road construction and maintenance, acquire property for both roads and bridges, and thus exercise State delegated powers and governmental functions in constructing and maintaining roads and bridges. *Id.* at 5. But in contrast to what was shown in *Grimshaw*, it does not say much with respect to the degree of control the State exercises over it. In a later brief, the County basically just points to Georgia law showing that it is cloaked in the State's residual sovereign immunity until waiver is shown. Doc. # 25.

residual sovereign immunity *FMC* illuminated.[6] In the latter cases, Georgia courts scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates. "[T]here are a number of decisions holding," for example, Georgia

> county departments of family and children services [DFACS] to be instrumentalities of the state for other purposes. *See Horne v. Skelton*, 152 Ga.App. 654, 655(1), 263 S.E.2d 528 (county department of family and children services found to be an instrumentality of the state when power to appoint county director by the commissioner of DHR involved); *Employees Retirement System of Ga. v. Baughman*, 241 Ga. 339, 245 S.E.2d 282 (DFACS employees are state employees for the purpose of determining retirement benefits); and *Ga. Dept. of Human Resources v. Demory*, 138 Ga.App. 888, 227 S.E.2d 788 (DFACS determined to be a state instrumentality distinct from Hall County Board of Health, a county instrumentality, for purposes of workers' compensation). *Also see Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga.1989) (DFACS is instrumentality of the state for the purpose of Eleventh Amendment immunity).

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[6] Where residual sovereign immunity is shown, incidentally, Georgia courts place the burden on those opposing it to show that it has been waived. *CSX Transp., Inc. v. City of Garden City, Georgia*, 196 F. Supp. 2d 1288, 1293 n. 5 (S.D. Ga. 2002), *aff'd in part and remanded for further proceedings*, ___ F.3d ___, 2004 WL 49117 (11th Cir. 1/12/04).

Floyd County Grand Jury v. Dept. of Family & Children Servs., 218 Ga.App. 832, 834 (1995); *compare Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990) (School board in Alabama county was not arm or alter ego of state, for Eleventh Amendment immunity purposes).

Floyd County's holding is consistent with the Georgia State government's basic contours; counties are geographical subdivisions administering (as do the County police, for example) State-delegated (called "Home rule" and "Supplementary") powers at the county (local) level. *See Gilbert*, 264 Ga. at 747; Ga. Const. 1983, as amended 1991, Art. 9, § 1 ¶¶ 2-3. Counties, then, by power-decentralizing *design*, are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State power.

Plaintiffs do not dispute that Georgia's constitution extends sovereign immunity to the state, its departments, agencies and also its counties. *Gilbert*, 264 Ga. at 747. Nor do they dispute that counties exercise State power to acquire land and build/operate roads and bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating State's delegation of its powers to a county with respect to county road systems); *id.* § 32-4-92(3)(A) (counties may exercise the State's power to condemn land for roads); *id.* § 32-4-92(8) & (11) (county can exercise the State's power to tax for roadbuilding/maintenance purposes); § 32-4-70 - § 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same); *see also* § 32-4-90 *et seq.* (delegation of State power to municipalities for municipal street systems, including bridges).

The County, in acquiring the land and constructing/operating the public highway and bridge in question, exercised that very State power. And its mere act of building/operating roads and bridges does not waive its sovereign immunity. *See Kordares v. Gwinnett County*, 220 Ga.App.

848, 849-50 (1996) (County was protected by sovereign immunity from negligence claim arising from death of decedent who was killed when he attempted to cross county bridge, and bridge partially collapsed).[7]

Indeed, courts more or less *presume* that when a county exercises State power (*e.g.*, police power) the State's sovereign immunity extends to it until the challenging party shows otherwise (*e.g.*, that the county waived its sovereign immunity by purchasing insurance). *See Smith v. Chatham County*, ___ Ga.App. ___, 2003 WL 22700904 at * 1 (11/17/03) (County had not purchased liability insurance for damages arising from negligence of duly authorized officer in performance of his official duties, and thus, county did not waive sovereign immunity from liability for injuries sustained by motorists when truck pursued by police officers

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[7] This is not a new concept. *See Mann v. County, Bd. of Arlington County*, 98 S.E.2d 515, 518 (Va. 1957) (Even though Arlington County had taken on characteristics of city and exercised many powers and performed many services customarily rendered by municipal corporations, and even though it had elected to operate its own system of roads, nevertheless "[i]n Virginia, territorially and politically, counties are integral parts of the State," so the county could not be held liable for injuries sustained by a pedestrian when an automobile crossed the curbing between a parking area and a sidewalk and crushed the pedestrian against a store front, allegedly as a result of the county's negligence in maintaining a parking area immediately adjacent to the sidewalk and in permitting motor vehicles to be parked perpendicular to the curb without stanchions or other safeguards to prevent their entering upon the sidewalk), cited in 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 399 (May 2003) ("[T]he view has been followed that, in the absence of statutory authorization, counties are generally not liable for injuries to persons or property caused by defects in their highways, streets, and bridges") and *id.* § 120.

collided with motorists' vehicle)[8]; *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) ("The state of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute. This sovereign immunity extends to counties, as subdivisions of the state").

Here the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted State statute aimed at defeating or impinging admiralty law. *See supra* note 4.

IV. CONCLUSION

Accordingly, the Court ***GRANTS*** Chatham County, Georgia's motion for summary judgment (doc. # 16, *as amended*, doc. # 24), ***DENIES*** plaintiffs' motion for summary judgment (doc. # 21) and ***DISMISSES*** plaintiffs' Complaint ***WITH PREJUDICE***.

This 14th day of January, 2004.

/s/

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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[8] There the court noted that

> [t]he doctrine of sovereign immunity protects governments from legal action unless they have waived their immunity from suit. The immunity, at least for counties, may only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.

2003 WL 22700904 at * 1 (footnote omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Case No.: CV403-99

ZURICH INSURANCE COMPANY,

Plaintiff,

vs.

CHATHAM COUNTY, GEORGIA,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. 10), Plaintiff's Motion for Summary Judgment (Doc. 16), and Plaintiff's Motion to Strike (Doc. 14). After careful consideration, the Court **GRANTS** Defendant's motion for summary judgment and **DENIES** Plaintiff's motion for summary judgment and motion to strike.

BACKGROUND

This case arises out of an accident that occurred on October 6, 2002, when James K. Ludwig attempted to transverse the Causton Bluff Bridge ("Bridge"). The Bridge is a drawbridge that is owned, operated and maintained by Chatham County, Georgia. It is permanently connected to the Islands Expressway, a public road maintained by Chatham County, which connects the City of Savannah with Whitemarsh, Wilmington, and Tybee Islands.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels, and commercial vessels over the water

of the intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the Bridge for that purpose.

On October 6, 2002, Ludwig was in his vessel, "the Love of My Life," ("the Vessel") which is insured by Plaintiff Zurich Insurance Company. As he approached the Bridge, Ludwig contacted the bridge tender and requested that the Bridge be raised to permit his transit. At that time, the bridge tender opened the Bridge, pursuant to Ludwig's request, but soon noticed that, the northwest span of the Bridge was drifting down. Immediately, the bridge tender attempted to make radio contact with Ludwig to warn him of the Bridge's disfunction, but Ludwig had turned off his radio before entering the Bridge operational area. The Bridge tender stopped the span of the Bridge that was drifting down and started to raise it back up. However, the Vessel hit that span, then deviated to the southwest, striking the Bridge. As a result of the accident, $78,980.50 worth of damage was incurred on the Vessel. Plaintiff incurred additional expenses, all totaling $137,987.69.

On June 2, 2003, Plaintiff filed its Complaint in this Court asserting three counts: (1) negligence, (2) maintenance of a continuing nuisance, and (3) statutory and/or regulatory fault for violation of the navigable servitude encompassed by the U.S. Coast Guard and U.S. Corps of Engineers Permits. On November 24, 2003, Defendant filed the motion for summary judgment now before the Court, claiming that Plaintiff's claims are barred by the doctrine of sovereign immunity. On December 16, 2003, Plaintiff filed its response to Defendant's motion, as well as its own cross motion for summary judgment. Defendant filed a response to Plaintiff's motion on December 29, 2003.

Plaintiff filed its motion to strike on December 16, 2003, seeking to strike the affidavit of Robert Drewry contained in

Defendant's Motion for Summary Judgment. Defendant filed its response on December 29, 2003.

ANALYSIS

I. Standard of Review

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56 (c). The "purpose of summary, judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing, sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Tidmore Oil Co. v. BP Oil Co. /Gulf Prods. Div., a Div. of BP. Oil Co.*, 932 F.2d 1384, 1387-88 (11th Cir. 1991). The substantive law governing the action determines whether an element is essential. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *DeLong Equip. Co. v. Washington Mill Abrasive Co*, 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a

genuine issue as to facts material to the nonmovant's case. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510. However, if the nonmoving party's response to the, summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. *Pepper v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356; *see also Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512; *Johns v. Jarrard*, 927 F.2d 551, 556 (11th Cir. 1991).

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 551 F.2d 1235, 1237 (11th Cir. 1992); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). The Court must avoid weighing conflicting evidence. *Liberty Lobby*, 477 U.S. at 255, 106 S. Ct. at 2513; *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. *See, e.g., Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of, material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). In light of this standard, the Court will now address the parties' arguments for summary judgment.

II. Defendant's Motion for Summary Judgment

Defendant contends that summary judgment should be granted in its favor on Plaintiff's claims because it is entitled to sovereign immunity The Eleventh Circuit Court of Appeals recently held in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003), that a Florida county is not entitled to a defense of immunity based on Eleventh Amendment Sovereign immunity).[9] . However, Defendant asserts as the source of its immunity, not the Eleventh Amendment, but a "residual sovereign immunity" that arises from common law. *See Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753,122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

The Eleventh Amendment is a Congressional response to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. 419 (1793), which held that "Article III of the Constitution authorized citizens of one State to sue another State in federal court." *Fed. Maritime*, 535 U.S. at 752, 122 S. Ct. at 1870. The adoption of the Eleventh Amendment effectively overturned *Chisolm*'s holding. However,

> [instead] of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh

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[9] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

> Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.

Id. at 753, 122, S. Ct. at 1871 (quoting *Alden v. Maine*, 527 U.S. 706, 723, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)).

This case does not involve a state, but rather a county. If Plaintiff were attempting to sue the State of Georgia, the question of the state's sovereign immunity would be clear. *See Fed. Maritime*, 535 U.S. at 760, 122 S. Ct. at 1875 (holding that, a state cannot be subject to suit in the Federal Maritime Commission because of its substantial similarity to an Article III Court). The pertinent issue before the Court then is whether the County is entitled to the same immunity as the state.

According to Defendant, it is entitled to the protection of sovereign immunity because it is a political subdivision of the State of Georgia. In support of its argument, Defendant cites *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952),[10] which, involved a suit, in admiralty for damages resulting from an accident in which a yacht struck an underwater projection that was part of the abutment of a

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[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

county-owned drawbridge. In that case, the Fifth Circuit held that the county, as a political subdivision of the state, was immune from suit.

In support of its holding, the Fifth Circuit relied on two cases, *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), and *Workman v. City of New York* 179 U.S. 552, 570 (1900), and concluded that a Florida county that owned and operated a public bridge using power delegated to it from the state enjoyed sovereign immunity from admiralty process, the functional equivalent of being immune from an admiralty suit altogether. *Wickman*, 195 F.2d at 615. In *Wickman*, the circuit court based its decision not on the immunity provided by the Eleventh Amendment, but on the state's residual sovereign immunity. *Cont'l Ins. Co. v. Chatham County*, No. CV403-38 (S.D. Ga. Jan. 14, 2004) (order granting summary judgment). When a city or other municipal entity is not exercising power delegated from the state, however, the *Wickman* court acknowledged that sovereign immunity would not be available. *Wickman*, 195 F.2d at 615.

The issue then becomes whether, in this case, the County may be deemed part of the state, either by having exercised power delegated from the state, or because it is a political subdivision of the state. If the County is deemed part of the state, then it may invoke residual sovereign immunity. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (recognizing residual sovereign immunity to protect a "sovereign or a party with sovereign attributes"); *J. Ray McDermott & Co. v. Dent of Highways, State of La.*, 267 F.2d 317 (5th Cir. 1959) (affirming lower court's extension of sovereign immunity to a department of the state). However, if it is not deemed part of the state, then it is subject to this Court's jurisdiction and Plaintiff's claims may proceed.

To determine whether a governmental entity was acting as part of the State, courts typically examine whether it was

exercising power delegated from the State or whether it was performing a proprietary function. *See, Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1111 (N.D. Cal. 2002) ("Lower courts are to determine a public entity's sovereignty 'not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citing *New York*, 256 U.S. at 500, 41 S. Ct. at 588; *Workman*, 179 U.S. at 570, 573-74, 21 S. Ct. at 212); *see also Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994) (identifying counties as departments or agencies of the state for state law immunity purposes). Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3) (A) (counties may exercise the state's power to condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); O.C.G.A. §§ 32-4-70 - 324-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same).

By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in the absence of waiver, Georgia's sovereign immunity extends to counties as subdivisions of the state). In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County*, 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003). In this case, the County has no immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived. Accordingly, the Court finds that the County is protected by

sovereign immunity. Defendant's motion for summary judgment is GRANTED.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED** on sovereign immunity grounds. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. The Clerk of Court is **DIRECTED** to **CLOSE** this case. Because summary judgment has been granted in Defendant's favor, Plaintiff's cross motion for summary judgment and motion to strike are **DENIED AS MOOT**.

SO ORDERED this 20th day of June, 2004.

/s William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF
JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[ATTACHMENT TO DEFENDANT'S MOTION TO DISMISS THE APPEAL]

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10661
Non-Argument Calendar

D.C. DOCKET NO. 03-00038-CV-4

CONTINENTAL INSURANCE COMPANY,
Subrogated to the rights of
Dennis K. Rings,

Plaintiffs-Appellants,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(JULY 8, 2004)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

In a comprehensive order dated January 14, 2004, the district court held that appellee Chatham County, Georgia is entitled to sovereign immunity from appellants' suit for damages sustained when a span of a draw bridge operated by the County struck appellant Riggs' vessel while it passed beneath the bridge. The court therefore granted the County summary judgment.

Appellants now appeal, contending that the district court erred in granting the County sovereign immunity and in denying their motion for summary judgment. Their appeal therefore turns on whether the court properly applied the law relating to sovereign immunity. We find no error in the court's ruling. We adopt its analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity and affirm the court's judgment.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13308
Non-Argument Calendar

D. C. Docket No. 03-00099-CV-4

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(JANUARY 28, 2005)

Before BLACK, PRYOR and FAY; Circuit Judges.

PER CURIAM:

This case presents the question of whether or not a Georgia county can be held liable in admiralty for a maritime tort. The district court granted summary judgment to Defendant Chatham County, Georgia, ruling that it was an arm of the State of Georgia, and entitled to sovereign immunity. Moreover, the district court found that Chatham County did not waive its sovereign immunity. Plaintiffs, Zurich Insurance Company, James K. Ludwig, Jr., and Carol Ludwig appealed. We agree that Chatham County is entitled to invoke sovereign immunity, and therefore affirm the district court's grant of summary judgment to the Defendant.

Chatham County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River in Georgia, which is part of the Intercoastal Waterway. On October 6, 2002, James K. Ludwig sailed his vessel on

the Intercoastal Waterway, approaching the Causton Bluff Bridge. Mr. Ludwig contacted the bridge operator and requested that the bridge be raised, to allow his vessel to pass underneath. The bridge tender then raised the spans, but the Northwest span of the bridge drifted down; striking Mr. Ludwig's vessel: The damage to the boat amounted to $137,987.67. Mr. Ludwig and his wife, Carol, and their insurer, Zurich Insurance Company, sued Chatham County to recover their expenses. Both Chatham County and the Plaintiffs moved for summary judgment. The district court granted summary judgment to Chatham County, holding that the County enjoyed sovereign immunity because by acquiring land, constructing, and operating the bridge, the County exercised state powers. Additionally, because the County had no immunity-waiving insurance, the Plaintiffs could not demonstrate that the county waived that sovereign immunity.

We review a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We construe the evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999).

At issue in this case is the Plaintiffs' ability to sue Chatham County. It is clear that the State of Georgia itself cannot be sued under maritime law based on Eleventh Amendment sovereign immunity. *See Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). The same immunity,

however, does not extend to counties.[1] Rather, common law has carved out a "residual immunity," which would protect a political subdivision such as Chatham County from suit. *See Gilbert v. Richardson*, 452 S.E.2d 476, 478 (Ga. 1994); *Fed. Maritime Comm'n*; 535 U.S. at 753 ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity").

In *Broward County, Fla. v. Wickman*, the former Fifth Circuit determined, in a substantially similar case where the plaintiff's yacht struck an underwater abutment attached to a county-owned bridge, that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." 195 F.2d 614, 615 (5th Cir. 1952).[2] *Wickman* explained that because the county owned the bridge and used power delegated by the state to operate the bridge, then the county enjoyed sovereign immunity from a suit in admiralty. *Id.*

The *Wickman* court took care to distinguish itself from *Workman v. City of New York*, 179 U.S. 552 (1900), a case

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[1] Chatham County is not asserting an Eleventh Amendment immunity defense, which would be inapposite to our holding in *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003). In *Vierling*, we explained that the Broward County Port Authority was not an arm of the state for Eleventh Amendment purposes because Florida law treated it solely as an entity of the county. Florida had no control over the operation of the port facilities, and Port Authority was an unfunded, independent, and self-sufficient enterprise.

[2] In *Bonner v. City of Prichard* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

primarily relied upon by the Plaintiffs here, where the Supreme Court addressed the substantive law of admiralty, and wrote that local law could not preempt federal admiralty law in order to exempt the City of New York from process. As substantive law was not the issue in *Wickman*, the Fifth Circuit drew a parallel to another Supreme Court decision, *Ex Parte State of New York*, 256 U.S. 490 (1921), which as part of procedural law, found that sovereign immunity principles prevented a court from exercising jurisdiction over the defendant. 256 U.S. at 500. Although our binding precedent is far from recent, the same principle holds true today: "the immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear." *J. Ray McDermott & Co., Inc. v. Dept. of High., State of La.*, 267 F.3d 317 (quoting *New York*, 256 U.S. at 500).

We note, however, that when a city, county, or other municipal entity is not exercising power delegated from the state, it cannot be sheltered by sovereign immunity. *Wickman*, 195 F.2d at 615. Therefore, we turn to a decision of this Court in a nearly identical case involving the same bridge, the same county and the same tort. We affirmed, without opinion, the case of *Continental Ins. Co. v. Chatham County. Ga.*, Case No. 04-106610F (11th Cir. 1/14/2004). In *Continental*, the district court granted summary judgment to Chatham County on grounds of sovereign immunity, and explained that the first line of inquiry should be whether the entity could be deemed a part of the State, because only then may it invoke residual sovereign immunity. In addressing that question, the trial court found Chatham County to be an arm of the State of Georgia because it exercised state power by "acquiring the land and constructing/operating the public highway and bridge in question." *See e.g.*, O.C.G.A. § 32-4-92 (enumerating state's delegation of its powers to county with respect to the operations of a county road system); O.C.G.A. §§ 32-4-70, 32-4-71 (governing county authority to contract for the construction and maintenance of bridges).

Moreover, this Court has held that "sovereign immunity extends to counties, as subdivisions of the state." *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993).

The district court in the instant case adopted much of *Continental*'s reasoning, and we agree, as we did in affirming *Continental*. This case is no different, and, despite Plaintiffs' insistence, the "mere act" of maintaining and operating bridges and roads does not waive a county's sovereign immunity. In *Continental*, the district court noted Chatham County's lack of immunity-waiving insurance as evidence of non-waiver. Chatham County's insurance policies have not changed since. Additionally, we previously have found that "the State of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute." *Kitchen*, 6 F.3d at 731. Chatham County has not so expressly waived its sovereign immunity. Thus, because Chatham County is not attempting to exempt itself from a suit in admiralty via local law, *see Workman*, nor has it waived sovereign immunity, we AFFIRM the district court's grant of summary judgment for the Defendant Chatham County.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13308-DD

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Zurich Insurance is DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

SUPREME COURT OF THE UNITED STATES

ZURICH INSURANCE CO.,
v.
CHATHAM COUNTY, GEORGIA.

No. 04-1618.
Oct. 17, 2005.

Order granting the petition for writ of certiorari amended to read: Petition for writ of certiorari granted limited to the following question: "Whether an entity that does not qualify as an 'arm of the state' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit."